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No. 127

In the
Supreme Court of the United States
OCTOBER TERM, 1953

MARY JEAN PARSONS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Mary Jean Parsons, respectfully shows:

I.

SUMMARY OF STATEMENT OF THE MATTER INVOLVED

Mary Jean Parsons was charged by indictment with the offense of murder. Upon trial in a District Court of Wichita County, Texas, the jury returned a verdict of guilty as-

sessing punishment at confinement in the penitentiary for a period of ten years. On appeal to the Court of Criminal Appeals of Texas, the highest court of the State of Texas in which a decision could be had in her case (Constitution of Texas, Article V, Sections 4 and 5; Title 38, Vernon's Texas Civil Statutes; Title 2, Texas Code of Criminal Procedure, 1925; Appendix, p. 13), the trial court judgment was affirmed. In the trial of the case petitioner's counsel did not contest the prosecution's contention that she was responsible for the homicide. Her only defense was insanity.

Petitioner's counsel filed a first application for a continuance, grounded upon the absence of two witnesses, residents of El Paso, Texas, who had been served with process commanding their appearance. The failure of these witnesses to appear in response to the subpoena was explained by statements that they were enceinte and were not in a physical condition to make the trip from El Paso, Texas, to Wichita Falls, Texas, and to testify. The statements were made by the attending physicians. The materiality of the testimony of these witnesses was shown by the application for continuance; and it appeared therefrom that they, associates of petitioner, were important lay witnesses as to petitioner's conduct and as to her mental condition. Without considering the merits of the application the trial court struck the motion on the ground that it was verified by one of petitioner's counsel and not by petitioner (Tr., pp. 242 to 261, application for continuance, pp. 242-258, motion to strike application for continuance, pp. 258-261, order of court granting motion to strike, p. 261; S. F., "State's An-

nouncement of ready and Defendant's motion of continuance," pp. 1 to 41, motion to strike Defendant's motion for continuance, pp. 5 to 9, order of court granting motion to strike, p. 9, Defendant's motion for continuance, pp. 15 to 40).

In the course of the trial the Court admitted in evidence, over petitioner's objection, in rebuttal of the defense of insanity, various letters, writings and photographs that had been obtained by a general exploratory search of petitioner's home conducted by El Paso city and El Paso county law enforcement officers while petitioner was confined in the county jail. United States "military police officers" came about the time the investigation was completed (S. F. 88). The search was made without obtaining a search warrant or petitioner's consent (Tr., pp. 91, 164, 168, 172, 177, 204, 205, 209, 210, 214, 215, 219 to 221, 223 to 226, 230, 233 to 239, 310 to 312, 316, 317, 341 to 344, 364, 369 to 371, 376 to 378; S. F. 52, 62, 85, 88, 98 to 101, 107, 122 to 124, 259 to 272, 754 to 757, photographs 1185 to 1207, torn notes 1163, 1164 and 1165, letters 1167 to 1184, 1208 and 1209.)

BASES UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT HAS JURISDICTION TO REVIEW THE JUDGMENTS OF THE TRIAL COURT AND OF THE COURT OF CRIMINAL APPEALS OF TEXAS.

1. The Supreme Court of the United States has jurisdiction under Section 1257 (2) and (3), Title 28, United States Code.

2. Article 545, Code of Criminal Procedure of Texas, 1925, provides that:

> "All applications for continuance on the part of the defendant must be sworn to by himself."

In this case the article was construed and applied by the trial court and the Court of Criminal Appeals of Texas to require, as an indispensable part of an application for continuance, verification by the defendant, although the defense was insanity and it was alleged in the application that the defendant was insane (Tr., pp. 242, 258, 261, 262, 314, 326 to 329, 363, 364, 376, 379 to 384; S. F., Vol. "State's Announcement of Ready and Defendant's Motion of Continuance," pp. 1 to 41, Motion to Strike Defendant's Motion for Continuance, pp. 5 to 9, Order of Court granting Motion to strike, p. 9, Defendant's Motion for Continuance, pp. 15 to 40).

Article 708, Texas Code of Criminal Procedure, 1925, (Appendix, p. 15), provides that a person, who is in an insane condition of mind when offered as a witness or was in that condition at the time the events happened of which he is called to testify, is not competent to testify. So Article 545, construed to require a defendant, relying upon insanity as a defense, to verify his application for a continuance alleging his insanity, would be to require him to make oath to that which would disqualify him to make that very oath.

The effect of the construction placed upon Article 545, Code of Criminal Procedure of Texas, 1925, in this case by the trial court and Court of Criminal Appeals is to cause it

to deny a continuance to insane defendants while all sane defendants may secure at least a first continuance. So construed and applied Article 545 is in violation of the Fourteenth Amendment to the Constitution of the United States, for it denies to petitioner privileges and immunities, the equal protection of the laws and due process of law, as secured to her by the Fourteenth Amendment to the Constitution of the United States.

The Court of Criminal Appeals in its original opinion, handed down on November 18, 1953, sustained the action of the trial court in striking the application for a continuance, grounding its ruling upon the basis that the accused was presumed to be sane; that upon a preliminary trial of the issue judgment was entered that she was not insane; that in the trial on which the appeal was prosecuted a jury found against the plea of insanity; and that no showing was made on motion for new trial that failure to secure a continuance resulted in injury to petitioner (Tr., p. 314; Appendix, p. 27).

On motion for rehearing it was urged upon the Court of Criminal Appeals that the trial court's construing the statute to inexorably require that, to be considered, an application for continuance, although it alleges the insanity of the defendant, must be verified by the defendant, would have the effect, in view of the disqualification of insane persons under Texas law to testify, to cause the statute to deny to insane persons any right to a continuance, while sane persons may secure continuances, with the result that insane persons by such construction of the statute would be

denied due process of law, equal protection of the laws and privileges and immunities in violation of the Fourteenth Amendment to the Constitution of the United States (Tr., pp. 376, 379 to 384 at 382, 326 to 329).

In the opinion on motion for rehearing the Court of Criminal Appeals answered this contention by disclaiming any intention of holding in its original opinion that an insane person is deprived of a right to make an application for a continuance, stating that its opinion is not susceptible for such interpretation, and further stated that it had jurisdiction to evaluate the merits of a motion for continuance where the trial court did not rule on its merits (Tr., p. 368). The effect was to deny petitioner's contention (Appendix, p. 39).

3. The Court of Criminal Appeals of Texas, sustained trial court rulings which allowed the prosecution to offer in evidence in rebuttal of petitioner's defense of insanity writings, letters and photographs obtained from a general exploratory search made by peace officers of her home without search warrant and while petitioner was confined in the county jail. The writings, letters and photographs were obtained in violation of the Fourth Amendment to the Constitution of the United States; and their being allowed to go in evidence amounted to a denial to her of rights secured to her by the Fourth Amendment, and to a denial to her of privileges and immunities, the equal protection of the laws and due process of law secured to her by the Fourteenth Amendment to the Constitution of the United States, and

particularly because Article 727a, Code of Criminal Procedure, Vernon's Texas Civil Statutes, 1948 (Appendix, p. 16), provided that:

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." (Acts of the 41st Legis., 2 C. S., p. 79, ch. 45, sec. 1, Acts 1929) (Appendix, p. 16).

4. In the trial court petitioner's counsel objected to the introduction in evidence of writings, letters and pictures obtained by the officers in their search of petitioner's home. Objection was based upon the claim that the writings, letters and photographs were obtained in a search conducted in violation of the Fourth Amendment to the Constitution of the United States (Tr., pp. 164, 165, 168, 169, 172, 173, 177, 178, 205, 206, 209, 210, 211, 216, 221, 226, 231, 235 to 240, 316, 317; S. F., pp. 259, 267, 269, 271, 272, 756, 757) and a claim of error therein was urged on appeal.

The Court of Criminal Appeals in its original opinion held that the peace officers were lawfully present in petitioner's home and it was their duty to obtain information as to whether the homicide was caused by criminal act, and that, notwithstanding *United States v. Lefkowitz, 285 U. S. 452*, and *United States v. Kirschenblatt, 16 Fed. 2d 202*, that the officers had the right to make the general exploratory search and seize writings, letters and photographs found in petitioner's home (Tr., pp. 316, 317).

The material so seized was not used in the trial for the purpose of proving the culpable character of the homicide. It was offered in rebuttal of petitioner's defense of insanity (Tr., pp. 177, 178, 204, 205, 206, 209, 210, 211, 214, 215, 216, 220, 221, 225, 226, 230, 231, 235, 236, 237, 238, 239, Court opinion pp. 310, 311, 312, Opinion on Motion for Rehearing, 371; S. F., pp. 754, 680 to 692, 754, 954, 955, 988).

The effect of the holding was that the search was justified by the lawful presence of the officers in petitioner's home, notwithstanding the limitations imposed by the Fourth Amendment and the Fourteenth Amendment to the Constitution of the United States upon peace officers in conducting searches of private premises and the seizing of property found therein. The search was not made in connection with an arrest or in connection with an offense committed in the presence of the searching officers. It was a matter of the officers looking for what they could find. Military police came in about the time the investigation was completed. The deceased was an officer in the United States Army (S. F., p. 88).

On motion for rehearing it was urged upon the Court of Criminal Appeals that the search and use in evidence of the material so obtained was in violation of the Fourteenth Amendment to the Constitution of the United States. The court disposed of the *Lefkowitz* case with the statement that it "was a review of a trial held in a Federal Court," and said that the court was "impressed with the latitude accorded State Court trials concerning questions of search and seizure as demonstrated by the relatively recent opinion

of that Court in *Salsburg v. Maryland, 98 L. Ed. (Adv. p.....)*." The Court further observed "that the search in this case was nothing like as intensive as that upheld in *Harris v. United States, 331 U. S. 145, 91 L. Ed. 1399*" (Tr., p. 371).

The Court of Criminal Appeals held that the search was authorized and the writings, letters and photographs properly admitted in evidence, but in doing so did not give mention to Article 727a, quoted above.

5. The questions presented in this petition are:

(1) Whether the construction of Article 545, Texas Code of Criminal Procedure, 1925, as requiring that petitioner's application for a continuance be struck from the record amounted to a denial to petitioner of rights secured to her under the Fourteenth Amendment to the Constitution of the United States; and whether the laws of Texas, Article 545 being so construed, accorded to petitioner a reasonable opportunity to obtain a continuance.

(2) Whether the introduction in evidence of writings, letters and photographs obtained by a general and exploratory search of petitioner's home without search warrant amounted to a denial to petitioner of rights secured to her under the Fourteenth Amendment to the Constitution of the United States in view of the Texas Statute excluding such documents from evidence where their possession was obtained in violation of the Constitution of the United States.

6. The questions presented in this application are substantial because:

(1) So far as petitioner's counsel are advised, no court, except the Court of Criminal Appeals of Texas in this case, has ruled upon the question involved in the order striking the application for continuance.

(2) The ruling of the trial court, sanctioned by the Court of Criminal Appeals of Texas, striking the motion for continuance, if enforced, would have the effect to deny to all insane persons brought to trial in criminal actions in Texas the right to a continuance, while all other persons, for good cause shown, may obtain at least a first continuance.

(3) The ruling of the trial court and of the Court of Criminal Appeals of Texas on the admissibility in evidence of the writings, letters and photographs seized in the search of petitioner's home, in the light of the Texas Statute, barring from evidence papers and material obtained in violation of the Constitution of the United States, appear to be in conflict with the holdings of this court in *Rochin v. California, 342 U. S. 165; Wolf v. Colorado, 338 U. S. 25,* and *Lefkowitz v. United States, 285 U. S. 452.*

7. The Court of Criminal Appeals of Texas entertained petitioner's second motion for rehearing, and on March 11, 1954, handed down a written opinion and entered the final order of that court overruling said motion. This petition will be presented by its being filed with the Clerk on or before June 8, 1954.

8. The opinions of the Court of Criminal Appeals of Texas in this case have not been officially reported. They appear in the record at pages 307 to 323 and 368 to 372, and are copied in the appendix to this petition, pages 17-44.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Article V, Section 4, Constitution of Texas:

"The Court of Criminal Appeals shall consist of three Judges, any two of whom shall constitute a quorum, and the concurrence of two Judges shall be necessary to a decision of said court. Said Judges shall have the same qualifications and receive the same salaries as the Judges of the Supreme Court. They shall be elected by the qualified voters of the State at a general election and shall hold their offices for a term of six years. In case of a vacancy in the office of a Judge of the Court of Criminal Appeals, the Governor shall fill such vacancy by appointment for the unexpired term.

"The Judges of the Court of Appeals who may be in office at the time when this amendment takes effect shall continue in office until the expiration of their term of office under the present Constitution and laws as Judges of the Court of Criminal Appeals."

Article V, Section 5, Constitution of Texas:

"The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law.

"The Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and under such regulations as may be prescribed by law, issue such writs as may be necessary to enforce its own jurisdiction. The Court of Criminal Appeals shall have power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction. The Court of Criminal Appeals shall sit for the transaction of business from the first Monday in October to the last Saturday

of June in each year, at the State capital and two other places (or the capital city) if the Legislature shall hereafter so provide. The Court of Criminal Appeals shall appoint a clerk for each place at which it may sit and each clerk shall give bond in such manner as is now or may hereafter be required by law, and who shall hold his office for four years unless sooner removed by the court for good cause entered of record on the minutes of said Court."

Article 543, Code of Criminal Procedure, 1925:

"First application by defendant.—In the first application by the defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state:

"1. The name of the witness and his residence, if known, or that his residence is not known.

"2. The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for, a subpoena, in cases where the law authorized an attachment to issue.

"3. The facts which are expected to be proved by the witness, and it must appear to the court that they are material.

"4. That the witness is not absent by the procurement or consent of the defendant.

"5. That the application is not made for delay.

"6. That there is no reasonable expectation that attendance of the witness can be secured during the present term of court by a postponement of the trial to some future day of said term. The truth of the first, or any subsequent application, as well as the merit of the ground set forth therein and its sufficiency shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a mat-

ter of right. If an application for continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the application was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted, and the cause continued or postponed to a future day of the same term."

Article 545, Code of Criminal Procedure, 1925:

"Application sworn to.—All applications for continuance on the part of the defendant must be sworn to by himself."

Article 708, Code of Criminal Procedure, 1925:

"Persons competent to testify: All persons are competent to testify in criminal cases except the following:

"1. Insane persons, who are in an insane condition of mind at the time when they are offered as witnesses, or who were in that condition when the events happened of which they were called to testify.

"2. Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath.

"3. All persons who have been or may be convicted of felony in this State, and who are confined in the penitentiary, shall not be permitted to testify in person in any court, for the State or for the defendant, but their deposition may be taken by the defendant as in other criminal cases provided by law."

Article 727a, Vernon's Code of Criminal Procedure of the State of Texas, Annotated:

> **"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."**

No. 26,493

MARY JEAN PARSONS, *Appellant*,

v.

THE STATE OF TEXAS, *Appellee*.

Appeal from Wichita County

OPINION

Mary Jean Parsons was indicted in El Paso County for the murder of her husband Richard O. Parsons. She was granted a trial in El Paso County upon the issue of insanity alone, and was found sane both at the time of the homicide on February 16, 1952, and at the time of the preliminary sanity trial on May 27, 1952. Thereafter the venue was changed from El Paso to Wichita County, and on February 11, 1953, a Wichita County jury returned their verdict wherein they found appellant sane at the time of the homicide and at the time of the trial, adjudged her guilty of murder with malice and assessed her punishment at 10 years in the penitentiary.

The statement of facts contains some 1,250 pages; the transcript more than 300 pages, and there are 58 bills of exception. Therefore a rather lengthy opinion seems to be justified, if not required.

The record has been carefully read and examined in the light of the well prepared briefs and arguments of able counsel, both for the state and for the appellant. It is apparent that all of the questions raised cannot be discussed herein, though each has received our careful attention.

Appellant, the daughter of a prominent and respectable family of Tulsa, Oklahoma, was married on January 2, 1952, to the deceased Richard O. Parsons, who had been recently commissioned as a Lieutenant in the United States Army and was under orders to report to Fort Bliss near El Paso.

Following a honeymoon trip to Santa Fe, New Mexico, appellant and the deceased came to El Paso and, after residing for a time in the Royal Arms apartment on Mesa Avenue, moved to Hampton Courts at 1820 Montana Street.

It was established that the homicide occurred on the morning of February 16, 1952, in Apartment No. 2 of the Hampton Court Apartments in El Paso, which appellant and the deceased occupied as their residence, consisting of a living room, bedroom, bath, kitchen and porch.

Appellant remained in and around the apartment during the entire day, and in the afternoon communicated by telephone with her parents in Tulsa, Oklahoma, and advised them she had killed her husband. She was told that counsel would be obtained for her.

Thereafter Mr. W. H. Fryer and his associate Mr. Jack Luscombe, prominent El Paso attorneys, arrived at the apartment and advised appellant that they had been employed to represent her.

Upon their arrival they found appellant in the apartment. The body of the deceased lay on the bed in the bedroom, with two bullet wounds in the head. A .32 caliber pistol was on a chair. The waste basket in the kitchen contained some torn writings of appellant which proved to be important to the state's case. Other letters and papers which were detrimental to appellant's plea of insanity were in the drawer of a desk.

The attorneys looked around the apartment, notified the officers by telephone and accompanied their client to the El Paso County Jail, advising her against making any statement to the officers regarding the homicide. We commend them and call attention to the fact that there was nothing said or done by Mr. Fryer or his associate which was not within the legitimate scope of their professional employment.

Justice of the Peace Charles Windberg, Jr., arrived at the apartment about 8 or 8:15 P. M., after the appellant had been accompanied to the jail by her attorneys. Thereafter several officers arrived and an investigation was made, including a rather thorough search of the apartment.

Appellant signed a statement in writing in which she confessed that she shot and killed her husband with a pis-

tol which she had purchased a few days before. The testimony offered by appellant in cross-examination of the state's witness also shows that she confessed that she shot and killed her husband.

Appellant pleaded not guilty and filed an application for suspension of sentence, but the sole defense was in fact that of insanity.

We will not attempt to set out the testimony offered in support of appellant's plea of insanity. Suffice it to say that the following facts, certified by the trial judge in some of the bills of exception, are fully supported by the evidence.

> "Be it remembered that on the trial of the above entitled and numbered cause the duly qualified medical experts, who had treated and examined the Defendant, testified that on February 16, 1952 she was suffering from a major, malignant, mental disorder known as schizophrenia of the catatonic type; that a catatonic schizophrenic will frequently go into and out of a state of stupor or retardation or loss of contact with environment; that it is a recurrent type of illness; that when having a catatonic attack such a schizophrenic acts impulsively and may become dangerous and homicidal; that on emerging from a catatonic attack, some contact with reality is established and there is memory; that in the opinion of scch doctors, *there* the Defendant at the time she pulled the trigger if she did, on the gun that killed Richard O. Parsons, this Defendant did not know the nature, quality, or consequences of such act and that she did not know right from wrong."
>
> "• • • The defendant, through counsel, adduced the testimony of three qualified medical doctors who testified that the defendant, Mary Jean Parsons was suf-

fering at the time of the trial from schizophrenia and that she was insane and still suffering from schizophrenia and that she needed medical attention for the treatment of this major, malignant, mental disorder."

In addition to the medical testimony, a number of witnesses who had been acquainted and associated with appellant testified for her and expressed the opinion that she was insane and did not know right from wrong.

Two letters written by appellant to her parents prior to the day of the homicide and referred to as "suicidal notes" were offered in behalf of appellant, one mailed from Santa Fe and another mailed from El Paso on February 1, 1952, at 3 P. M. These letters fully support the conclusion of appellant's witnesses, therefrom, that she was apparently contemplating suicide.

On the other hand a number of witnesses who had seen and observed appellant shortly before and after the homicide were called by the state and testified that they observed nothing to indicate that she was insane, and expressed the opinion that she was sane.

Among the documents introduced by the state, and which were relied upon as indicating sanity, are the following:

The written confession, made the night of the day of the killing, which reads as follows:

"About 8:00 P. M. last evening February 15th, 1952 my husband and I, went to the Apartment of Mr. and Mrs. Tom Fields to play canasta, we played canasta

untill about 11:30 P. M. We then went home. Shortly .....this we got in to an argument about our parents, my husband said my parents had done too much for us in every way, we then started arguing back and forth, I really dont know what it was all about. We then went to bed.

"I awoke about 6:00 A. M. February 16th, 1952, I then went and put the coffee on, I then sat down and smoked a cigarette, all this time thinking about the argument we had been having last night before we went to bed, I then went in to wake Dick up. When he woke up we started arguing again, all I can remember is that he my husband told me to go to hell. I then lost my head completely, I then went to the closet in the bedroom got my gun, returned to the bed where my husband was laying put the gun to his forehead and pulled the trigger twice. I dont remember any thing very clearly after this for some time. When I did come to my sences about 5:05 P. M. this afternoon I called my mother in Tulsa Oklahoma and told her what I had done. I then told her that I had not called the Police or anty one else, (my mother then told me that she would call my Father, and have him call me back, which he did about fifteen minutes later). My Father then asked me what I had done, and I told him that I had killed my husband, My Father then told me that he would charter a plane and come as soon as possiable, also that he would get me an attorney. My Father then called me back about twenty minutes after this and told me to wait untill my attorney came, before calling the Police, as he d they would make the proper arrangements. About 7:30 P. M. February 16th, 1952 Mr. Fryer and his partner came to my apartment, told me that my brother John B. Fleeger who lives in Tulsa Oklahoma had asked him to repesent me. Mr. Fryer and his partner went to the bed room looked at the body, then looked around the apartment, Mr. Fryer then asked me to tell him what had happened, which I did. Mr. Fryer then asked me if I needed a sedative

and I told him no. Mr. Fryer then went to the phone and called the Sheriff's Dept. He also called the coroner, he then brought me down to the Sheriff's Office, where I was placed in jail.

"After shooting my husband I placed the gun on a chair by the window in the bed room. I bought this gun at the Elpaso Sporting Goods Store, I also bought one box of shells with the gun. My husband was 24 years old and his home was in Pleasantville, New York his home was at 12 Hardscrabble Road with his mother and father before he entered the Service. He was stationed at Ft. Bliss and was going to start to School thursday.

"My husband and I were married January the 2nd, 1952 in Tulsa, Oklahoma.

"I went to Dippa Grocery store two times to day before I called my mother, the first time I went I bought a pocket magizene, the second time I went to the store I bought grocerys.

"The statement I have made to you is the truth to the best of my knowlege.

William R. Bain
John E. Tulk Mary Jean Parsons"

The torn notes found in the waste basket in the kitchen, which read:

"I had no grudge against my husband for he was the most wonderful man in the world but he too hated me. I had no intention of doing him any harm just killing myself until I caught him telling people that I was immoral, fattening, and illegal. I had no intentions of marrying him to hurt him but my brother told me it was the right thing to do to get married and move away from my home town. I have always taken people .. advice and never had a mind of my own. I am a coward, a failure at life and I know that I am going to

pay the full penalty. I have worried about it so much that am practically out of my head. I wanted to have a baby, have a happy home life, but for some reason never developed the way normal people do. If I had my life to live over believe me I would never have done any of these wicked deeds."

"* * *

"Every time I start to do something good it turns out bad. I hate myself but do not seem to know what I am doing until after it is too late. I wish to God that I had not committed this terrible sin—after it was."

"* * *

"Everything I start to do something good—it turns out bad. I hate myself but something inside of me always seems to say do the wrong thing. I wish to God now that I had not committed this terrible sin. I guess that its something inside of you that keeps telling you and egging you on to worse and worse sins against Almighty God. I always had a chip on my shoulder against the whole world for all the people who seemed to enjoy life and could laugh, love for some reason I was not capable of such pleasures. I have wished many many times I had not been born to worry the people who loved me and raised me. My parents address is 2424 East 29 St., Tulsa, Oklahoma.

"Dicks parents address is 12 Hardscrabble Road
Pleasantville, New York."

A number of letters written by appellant to the deceased prior to their marriage were offered by the state. These letters appear to be normal love letters and the witnesses so construed them.

A note to a friend, dated February 14, 1952, was also offered in which we observe nothing to suggest that the writer was mentally deranged.

It is earnestly urged that the verdict finding appellant sane is so against the great weight and preponderance of the evidence as to be clearly wrong, and we should therefore reverse and remand the case.

We confess that we are unable to distinguish this contention from that often urged and which we disposed of in *Wenck v. State, 238 S. W. 2d 793*, in the following language:

> "It is urged, however, that the verdict of the jury should be set aside as being contrary to the preponderance and great weight of the testimony.
>
> "We are aware of no decision by this court wherein a reversal solely on this ground has been ordered, though similar contentions have been often urged. See 18 Tex. Jur. 464; Griffin v. State, Tex. Cr. App., 226 S. W. 2d 869; Rose v. State, Tex. Cr. App., 220 S. W. 2d 137; Cavanar v. State, 99 Tex. Cr. R. 446, 269 S. W. 1053; Murray v. State, 147 Tex. Cr. R. 474, 182 S. W. 2d 475.
>
> "Every person is presumed to be sane, and to have sufficient judgment and reason to be responsible for his acts until the contrary is established. To discharge appellant from such responsibility, it was necessary that she prove by a preponderance of the evidence that her intellect was so disordered that at the time of the killing, she did not know the nature and quality of the act she was doing, or if she did so know, that she was unable to distinguish between the right and the wrong of the particular act charged, that is, murder. See Ex parte McKenzie, 116 Tex. Cr. R. 144, 28 S. W. 2d 133.
>
> "Whether such degree of insanity exists is a question of fact to be determined by the jury. They alone are made the judges of the weight to be given to the testimony of the witnesses and to the opinions expressed by them."

Also in *McGee v. State, 238 S. W. 2d 707, 709 and 710,* we said:

> "No necessity exists to state at length the evidence supporting this defensive theory. It is sufficient to say that it is difficult to understand how a stronger defense of insanity could be developed in the trial of a criminal case.
>
> "* * * * * From a medical standpoint, one may be insane by reason of mental disease or mania, yet, from a legal aspect, not unless or until his mental condition has reached the point where he is unable to distinguish right from wrong and to know the nature and consequences of his acts is he exonerated or excused from crime committed while in that condition. Ross v. State, 153 Tex. Cr. R. 312, 220 S. W. 2d 137."

As we view the evidence, the statement first quoted from *McGee v. State* might well apply here. Yet as in the *McGee* case, we are not authorized to substitute our judgment and view of the evidence for that of the jurors who saw, heard and observed the witnesses.

As presented in the brief of her able and eminent counsel, appellant's first complaint relates to the disposition of her first motion for continuance.

This motion was stricken on motion of the state because it was not sworn to by appellant, but by one of her attorneys.

Art. 545, C. C. P. provides: "All applications for continuance on the part of the defendant must be sworn to by himself."

Appellant urges that it was proper under the circumstances for the attorney to swear to the motion because, as he therein alleged, "the defendant is insane and the facts of this motion are known to him (counsel)."

The presumption that an accused is sane; the fact that a judgment had been entered upon a preliminary trial of that issue that she was not insane, and the finding of the jury in the present trial against the plea of insanity, both at the time of the act charged and at the time of the trial, precludes our consideration of appellant's motion upon the theory that she was insane and therefore need not comply with the statute.

Also we would not be warranted in reversing the conviction because of the striking of the motion unless it would have been error for the court to have overruled the same.

No showing was made that the failure to secure a continuance resulted in injury to appellant. In fact no motion for new trial is found in the record. And it is nowhere shown by affidavit of the absent witnesses, or otherwise, that they would have testified as stated in the motion if they had been present at the trial.

Upon the trial the state introduced the judgment rendered upon the preliminary trial of the issue of sanity, over appellant's objection, among others, that no predicate had been laid as to what evidence was offered or not offered upon which the judgment was returned; that the judgment was not binding "on this Court, that defendant, or this jury

or anybody else"; that it was rendered in a preliminary matter not final, not conclusive and not reviewable, and that it "is an invasion of the province of this jury."

If we understand appellant's contentions they are in the alternative as follows: (1) The court should not have admitted the judgment in evidence, or (2) having admitted it, should have instructed the jury not to consider it for any purpose, or (3) should have instructed the jury that they might only consider the judgment, if at all, as bearing on appellant's sanity on the date of its rendition, or (4) should have limited the jury's consideration of the judgment to the determination of appellant's sanity or insanity at the time of the present trial.

The precise question as to the admissibility of the prior judgment has been settled by former opinions of this court in *McMurray v. State, 168 S. W. 2d 858; Ross v. State, 101 S. W. 2d 253; Kellum v. State, 238 S. W. 940; Earles v. State, 84 S. W. 2d 235.*

The trial court in his charge limited the jury's consideration of the judgment. Appellant's exception to this charge will be discussed later in the opinion.

There was no error in the admission of the written statement or confession of appellant as testified to by the officers, nor can we agree that the evidence raised the issue of its voluntary nature requiring the submission of such question to the jury.

Here again we cannot accept the conclusion of appellant's counsel that she was insane at the time the con-

fession was signed. The issue was submitted to the jury both at the preliminary trial and here and both juries decided, contrary to appellant's contention, that she was sane at the time of the homicide. There is no evidence to even suggest that she became insane after the homicide and before the statement was signed, on the evening of the same day, and the court properly declined to submit such issue.

Appellant urges that the torn notes found in the waste basket by the officers who investigated the homicide and searched the apartment, the letters written by appellant to the deceased found in desk and dresser drawers, and an album of photographs of the wedding of appellant and the deceased, also found in the apartment, were each and all inadmissible because the search of appellant's home at a time when she was in jail was not authorized by law and was in violation of her constitutional rights.

The precise contention appears to be that although the Justice of the Peace and the officers assisting in the investigation of the homicide were lawfully present in the apartment in the discharge of their official duties, they were without authority to conduct a general exploratory search of the apartment, such search not being conducted as an incident to a lawful arrest.

Reliance is had upon *United States v. Lefkowitz, 285 U. S. 452, 76 L. Ed. 877*, wherein it was held that torn and incriminating documents found in a desk, cabinet and waste basket of the defendant's premises at the time of his arrest upon a valid warrant were inadmissible (though

articles found on his person were admissible) upon what is referred to as "the firmly rooted proposition that what are called general exploratory searches throughout premises and personal property are forbidden."

It is argued that here as in the *Lefkowitz* case, the search could not have been made and the evidence taken under a search warrant. The legal principle involved is stated in *U. S. v. Kirschenblatt, 16 Fed. 2d 202, 203* (cited in the *Lefkowitz* opinion) as follows:

> "Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent * * *."

We find no difficulty in distinguishing the case now before us and the authorities relied upon. The evidence here in question was obtained by the justice of the peace and the officers who were assisting him in the investigation of the homicide, at the scene thereof, and before the body was removed.

The justice of the peace, acting as coroner, was charged with the duty of obtaining information as to whether death was caused by some criminal act, to obtain evidence to prevent the escape of the guilty, as well as to furnish the foundation for a criminal prosecution in case the death was shown to be felonious. *Pierson v. Galveston County, 131 S. W. 2d 27, 13 Am. Jur., p. 108.*

The justice of the peace and his assisting officers were not therefore bound by the rule governing the action of an officer lawfully present for the purpose of arresting the occupant of the premises.

On the other hand, it was their duty to conduct the search at the scene of the homicide and to preserve evidence there found which might show that the death was the result of an unlawful and criminal act. The officers were therefore lawfully present in the discharge of their official duties and the search was not unreasonable or unlawful.

Bills 56 and 58 complain that jurors Lawson and Chase, respectively, were held to be qualified which resulted in appellant being compelled to accept another juror who was objectionable to her.

Venireman Lawson testified on his voir dire that from reading newspaper accounts he had formed an opinion as to the guilt or innocence of appellant which it would take evidence to change. He testified further, however, that he could lay aside what he had read and base his verdict solely on the sworn testimony admitted at the trial, uninfluenced from any other source.

There was no error in the overruling of appellant's challenge for cause to this juror upon the ground of opinion from reading newspaper reports. *Myers v. State, 160 S. W. 679; Pugh v. State, 186 S. W. 2d 258; Art. 616, Sec. 13, C. C. P.*

This venireman also was asked by one of appellant's counsel whether, if he decided that she was insane at the

time of the act, he would "turn her loose." Objection was made and thereafter the court attempted to explain to the jury that two questions would be asked as to insanity and that "it will take both of those in order to acquit as you say."

We do not think that the prospective juror was subject to challenge because of the statement of the court wherein he used the term "to acquit as you say" instead of "turn her loose" as previously stated by counsel. It is of course true that she would not be "turned loose" except in the event the jury should find that she was sane at the time of the trial and insane at the time of the act. Art. 932(a), V. A. C. C. P.

And Venireman Lawson testified that if chosen he would follow the law that no act done in a state of insanity can be punished, and that if the court so instructed and he decided from a preponderance of the evidence that the defendant was insane he would acquit her.

Venireman Chase, in answer to a question propounded by appellant's counsel, stated that if selected as a juror and he believed that a defendant was guilty of murder with malice, as charged, he would not believe in a suspended sentence.

The Venireman then stated, in answer to question of appellant's counsel, that he would consider the suspension of sentence in such a case if he thought the facts justified a suspended sentence.

The juror further gave this testimony, the question being propounded by appellant's counsel:

> "Q. Now do you have any prejudice against the suspended sentence law?" To which the said juror replied:
>
> "A. No, sir, sure don't."

We are unable to agree that the trial court abused his discretion in overruling appellant's challenge for cause to this prospective juror.

Bills of Exception 4, 32 and 54, are addressed to the court's charge limiting the jury's consideration of the judgment on the preliminary trial, the instruction being as follows:

> "There has been introduced in evidence before you the verdict of the jury rendered at a previous sanity trial of the Defendant, Mary Jean Parsons, and the judgment entered on said verdict. In this connection you are instructed that you are not to consider this evidence as binding upon you or establishing the fact of the Defendant's sanity at the time the offense is alleged to have been committed, if it was, or at the present time (The time of this trial), but you will only consider said evidence, if at all, as a fact or circumstance relative to the issue of the Defendant's sanity or insanity at such time or times, if it does so, together with all other evidence presented to you on this issue, and for no other purpose."

This instruction was objected to as being a comment on the weight of the evidence; as ineffectually limiting the testimony.

And at the time of the offer of the judgment, without waiving his objection to its introduction, appellant requested that the jury be instructed in regard thereto as follows:

> "This judgment may only be considered by you as a circumstance along with other evidence and circumstances before you touching upon the sanity or bearing upon the sanity or insanity of Mary Jean Parsons as of the date of the rendition of that judgment and no other issue."

Also appellant sought to have the jury instructed to the effect that if they considered the judgment at all, it should be considered only as a circumstance affecting the issue of insanity at the time of this trial, and not on the mental condition of appellant at the time of the killing.

The jury's verdict formed a part of the judgment upon the preliminary trial, and we find no merit in the complaint that the court in his instruction referred to the verdict as having been introduced.

Having concluded that the court did not err in admitting the judgment we find no error in the charge limiting its consideration. Appellant asked that it be limited, and we are not impressed with the argument that the charge given was on the weight of the evidence in unduly emphasizing this evidence.

In *McMurray v. State, 168 S. W. 2d 858*, we held that the judgment upon the preliminary trial was admissible. The records of this Court disclose that the judgment introduced in that case contained a finding of sanity both at the time of the preliminary trial and at the time of the offense.

We are cited to no rule of law which would require that the evidence, if admissible, should be limited to the issue of present insanity.

We find no reversible error in the court's charge defining malice aforethought and applying the same to the facts.

It was not incumbent upon the court to refer in each paragraph of the charge to the defense of insanity nor to instruct the jury concerning their duty to consider the charge as a whole.

The trial jury was instructed to acquit appellant of murder with malice unless they found beyond a reasonable doubt that the killing was upon malice aforethought, as defined in this charge.

They were then instructed that if they found her not guilty of murder with malice, to next consider whether she was guilty of murder without malice. And following the submission of murder without malice from the state's standpoint, the jury was instructed that unless they so found and believed beyond a reasonable doubt, to acquit of murder without malice.

Under the provisions of Art. 666, C. C. P. we are not authorized to reverse for what are claimed to be errors in the court's charge submitting insanity at the time of the trial. We are not aware of any evidence in this voluminous record which would support a finding that appellant, if sane at the time of the killing, thereafter became insane prior to the present trial.

The record sustains the conclusion that insanity at the time of the offense was the real issue, and if appellant had been successful in securing a favorable finding upon that issue, she would not have benefited but rather would have suffered by a further finding of present insanity. A verdict of sanity at the time of trial and insanity at the time of the killing would have called for her release, whereas a finding of insanity at both times would have required her to be committed to a state hospital. Art. 932(a), V. A. C. C. P.

A number of bills complain that the court abridged appellant's defense by refusing to affirmatively present the defensive theory to the jury that at the time of the killing appellant was suffering from schizophrenia.

Upon the defense of insanity, the trial court instructed the jury in part as follows:

> "* * * to establish a defense on the ground of insanity; it must be proved, not beyond a reasonable doubt, but by preponderance of the evidence, that at the time of committing the act, the party accused was laboring under such defect of reason, from disease of mind, as not to know the nature and quality and consequences of the act she was doing; or if she did know, that she did not know she was doing wrong,—that is that she did not know the difference between the right and wrong as to the particular act charged against her. The insanity must have existed at the very time of the commission of the offense, if the same was committed, and the mind must have been so dethroned of reason as to deprive the person accused of a knowledge of the nature and quality and consequences of the particular act done and of the right and wrong as to the particular act done."

To have limited appellant's defense to the particular form of insanity with which her medical experts testified she was afflicted would be to detract from the testimony of non-expert witnesses, both for the state and the defense, who expressed an opinion on the question of her sanity and knowledge of right and wrong. For such non-expert witnesses could not know or testify that appellant was or was not a schinzophrenic.

The court did not err in not including in the submission of the defense of insanity an issue as to whether appellant was a schizophrenic.

Having properly applied the law of insanity by instructing the jury to acquit upon a finding that appellant was insane at the time of the act, it was not error for the court to decline to instruct further that it was not incumbent upon appellant to establish continuous insanity.

Appellant complains that forms were furnished the jury for their verdict, and that among the forms so furnished a verdict of not guilty on the grounds of insanity as suggested in Art. 700, C. C. P. was not included.

We observe that among the forms furnished the jury were the following:

> "(8) We the jury find the Defendant not guilty on the grounds of insanity, at the time the act is alleged to have been committed in the indictment but sane at the time of this trial."
>
> "(9) We the jury find the Defendant not guilty on the grounds of insanity at the time the act is alleged to have been committed in the indictment and insane at the time of this trial."

Art. 932(a), V. A. C. C. P. was enacted long after Art. 700, C. C. P., and since its enactment, the forms quoted are appropriate.

Bill No. 30 complains that the trial judge, after having received a report from the foreman of the jury to the effect that they had been unable to agree and indications were that they were hopelessly deadlocked, made the following remarks to the jury after they had been brought into court:

> "Now, Gentlemen, I know that you are tired and you have worked a long time, you have been at this a long time, but all of us have a lot invested in this and we would like to get a verdict if we can. I would like to suggest that you go to bed now and get some rest and work on it some in the morning. How do you feel about that?"

It is shown that at the time of said remarks the jury had deliberated for some eight hours, and reached a verdict more than fifteen hours thereafter. And it is not shown that the trial court inquired or was informed as to how the jury was divided as to number.

We cannot attribute to the remarks the construction that the trial judge was referring to financial investments or that the jury so construed the same.

The remarks of the trial judge do not call for reversal. Finding no reversible error, the judgment is affirmed.

Woodley, Judge.

(Delivered November 18, 1953.)

No. 26,493

MARY JEAN PARSONS, *Appellant*,

v.

THE STATE OF TEXAS, *Appellee*.

Appeal from Wichita County

OPINION

ON MOTION FOR REHEARING

This Court has been favored by five briefs representing the efforts of as many eminent and outstanding law firms from all sections of the State. We express our gratitude for the help which these fine lawyers, as well as the attorneys representing the State, have afforded us.

We shall attempt to discuss the contentions in the order presented.

In discussing the court's refusal to consider the motion for continuance, we first wish to disclaim any intention of holding in our original opinion, as appellant now claims we did, that an insane accused is deprived of the right to make an application for continuance. We do not think our opinion is susceptible of such interpretation.

Nor do we agree that this Court is without jurisdiction to evaluate the merits of the motion for continuance be-

cause the trial court did not rule on its merits. Such an interpretation of our jurisdiction would lead to absurdities. If a trial court rules correctly but for an incorrect reason, we nevertheless support his ruling for the simple reason that the appellant has not been injured.

The Supreme Court of the United States, in *Helvering v. Gowran, 302 U. S. 238, 82 L. Ed. 224*, expressed the same rule in this manner:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

When one complains of the failure of the trial court to grant continuance, it becomes incumbent upon him to show, both in the trial court and here, that he has been injured by such ruling. Such a showing is made by establishing with some degree of reliability that the missing witness would have testified to something material and beneficial to the accused. No affidavits of the missing witnesses were attached to the motion for continuance in the case at bar. This is not a prerequisite to a valid motion, but having failed to so attach them at that stage of the trial, it became incumbent upon an accused, who wishes to rely upon the alleged error of the court, to file a motion for new trial and there make his showing just as is required in cases involving jury misconduct. Without satisfactory proof to the contrary, the trial court might reasonably conclude that the witnesses

would not have so testified. A mere recitation that the appellant expects to prove certain things by the witnesses is not sufficient.

In *Morris v. State, 251 S. W. 2d 731 (writ of certiorari denied 73 S. Ct. 863, 345 U. S. 951, 97 L. Ed. 1374)*, in discussing a motion for new trial, we said:

> "The motion should have had the affidavit of the missing witness or a showing, under oath, from some other source that the witness would have actually testified to such facts."

Since the appellant filed no motion for new trial in this case, she merely waived an opportunity to show injury if she could, and no such showing is in the record before us; therefore, a reversal is not called for on this point.

We now approach the task of discussing the legality of the search of the appellant's home and appellant's contention that our original opinion has deprived her of the privileges, immunities and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Though we do not decide the question of the search on the basis of invitation or consent, we think it is reasonably inferable from the record that appellant's attorney, acting for her, called the officers and advised them that a homicide had occurred and that the corpse might be found in the appellant's apartment. It was in response to this call that the justice of the peace, acting in his capacity as a coroner, arrived at the apartment, and the search followed. We con-

clude that the coroner was lawfully there, and it became his duty under the law to view the body and ascertain the cause of death. Appellant would have us make a distinction between evidence relating to the cause of death and evidence relating to appellant's sanity. We do not think such a distinction exists, because both became issues in a trial growing out of the homicide. An analogy to this case may be found in the opinion of the Supreme Court of this State in *Polk County v. Phillips, 51 S. W. 328.* In that case a man had been shot by the constable. This was undisputed. The sole question sought to be ascertained by the justice of the peace was the direction in which the bullet passed through the body. That question became important in determining if the homicide was culpable. In the opinion by the illustrious Chief Justice Gaines, the Court said that the justice of the peace was authorized to order the autopsy for the purposes stated. In that case, the constable was asserting the affirmative defense of self-defense, and the Court held that the justice of the peace had the authority to search out information which might substantiate or refute such defense. In the case at bar, the appellant asserted the affirmative defense of insanity. By the same token, we think that the justice of the peace was authorized to search out information to substantiate or refute such defense.

Our holding is not predicated solely upon the presence of the justice of the peace. We think there is a clear distinction between the right to search predicated upon a lawful arrest or a search warrant and one predicated upon the presence of a dead body. In the latter case, it becomes the duty

of one and all lawfully present to ascertain, if they can, how and by whom death was caused and any facts that would tend to show whether the homicide was unlawful or excusable.

Appellant urges us to re-examine the holding of the Supreme Court of the United States in *Lefkowitz v. U. S.*, supra. We observe only that this was a review of trial held in a Federal Court. We are impressed with the latitude accorded State court trials concerning questions of search and seizure as demonstrated by the relatively recent opinion of that court in *Salsburg v. Maryland, 98 L. Ed. (Adv., p. .....)*. We observe that the search in this case was nothing like as intensive as that upheld in *Harris v. U. S., 331 U. S. 145, 91 L. Ed. 1399.*

Appellant again asserts that the trial court should have submitted to the jury the issue as to the voluntary nature of the confession. Appellant confessed within thirty minutes after the officers began to question her. The only testimony relative to this questioning came from the officers themselves, and they testified that she freely and voluntarily admitted shooting her husband. The police account of the confession is undenied. "Mere detention and police examination in private of one in official state custody do not render involuntary the statements or confessions made by the person so detained." *Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, at p. 499.* A trial court is never called upon to submit such an issue unless it is raised by the evidence.

As stated originally, the sole issue was that of appellant's sanity.

Remaining convinced that we properly disposed of this cause originally, appellant's motion for rehearing is overruled.

Morrison, Judge.

(Delivered February 10, 1954.)

FILED
AUG 11 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 127

MARY JEAN PARSONS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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No. .....

MARY JEAN PARSONS,
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THE STATE OF TEXAS,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas in this case have not been officially reported. They are copied in the record and in the appendix to Petitioner's Petition (Pages 17-44).

JURISDICTION

The jurisdictional requisites are not adequately set forth in the Petition and it is contended by your

Respondent that this Honorable Court is not shown to have acquired jurisdiction over this cause for the following reasons:

1. Your Petitioner herein has not complied with Rule 12 (1), 3rd Paragraph, by specifying the stage in the proceedings in the Court of First Instance and in the Appellate Court, at which, and the manner in which, the Federal questions sought to be reviewed were raised, nor the method of raising them; nor the way in which they were passed upon by the Court, with pertinent quotations of specific portions of the record where the matter appears, thereby failing to support their assertion that the rulings of the Court were of such a nature as to bring the case within the statutory provision believed to confer jurisdiction on this Court.

2. Petitioner seeks to invoke the jurisdiction of this Honorable Court under 28 U.S.C.A. 1257 (2) and (3) without complying with the requirements of such statute in setting up or claiming any right, title, privilege or immunity under the Constitution of the United States at the appropriate time in the State proceedings. It has long been the law of the State of Texas that matter as to which no exceptions were taken at the time of the trial and by motion for new trial are not properly before the Court of Criminal Appeals for review. *Stokes v. State,* 136 Tex. Crim. 443 (1939), 125 S.W. 2d 311; *Zweig v. State,* 74 Tex. Crim. 306 (1913), 171 S.W. 747; *Harvel v. State,* 126 Tex. Crim. 580 (1934), 72 S.W. 2d 604; *Fisher v. State,* 108 Tex. Crim. 623 (1927), 2 S.W. 2d 249; *Davis v. State,* 150 Tex. Crim. 124 (1946), 199 S.W. 2d 155.

3. Your Petitioner herein has not therefore followed the procedure of the State of Texas in raising the Federal questions. The Texas state practice requires that the disputed issues or questions must be raised before the trial court and that the same must be presented to the trial court at the point considered appropriate.

In the instant case, the Petitioner first complains that Article 545 of the Texas Code of Criminal Procedure (Vernon, 1948) is in violation of the Fourteenth Amendment to the Constitution of the United States. Nowhere in this entire record will it be found that the Petitioner made such an objection and reserved a bill of exception on this point in the trial court. There was a complete failure to raise the question at trial court level, thus precluding review by the Supreme Court. *Brown v. Mass*, 144 U.S. 573, 580 (1892); *Hulbert v. Chicago*, 202 U.S. 275 (1906). Nor will it be shown by the record that the Petitioner raised said question in a motion for new trial, purely for the reason that she did not file a motion for a new trial, but appealed directly from the jury's verdict to the Court of Criminal Appeals. As to this first question, the Court of Criminal Appeals of Texas was completely silent, not only in their original opinion but in the opinion on motion for rehearing. The reason for such silence, undoubtedly, was not only for the failure of Petitioner to raise said question at trial court level, but for the further reason that Petitioner failed to raise said question in her original appeal and on motion for rehearing. Only by oral argument on motion for rehearing and in her brief on second motion for rehearing did the Petitioner for the first

time raise this question. Oral arguments and briefs before State courts are not ordinarily part of the record filed with the Supreme Court and cannot be used to establish that a Federal question was raised. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). There is no language in any opinion of the Court of Criminal Appeals indicating that this Federal question was considered and disposed of. It is a matter of common knowledge that it is too late, of course, to raise the Federal question for the *first time* in the petition for a certiorari filed with the Supreme Court. Petitioner, therefore, having failed to raise this Federal question at either trial or appellate State court level, until the Second Motion for Rehearing, and the Appellate Court having failed to write an opinion on the same, your Respondent strongly urges that the jurisdiction of this Honorable Court cannot attach. Ordinarily, only if the State's highest court actually considers and disposes of a question can Supreme Court review be obtained.

4. In the instant cause, the Petitioner's second complaint is that the introduction in evidence of writings, letters and photographs obtained by a search of Petitioner's home without search warrant amounted to a denial of rights secured to her under the Fourteenth Amendment to the Constitution of the United States in view of Article 727a of the Code of Criminal Procedure of Texas. Your Respondent would again point out to this Court that Petitioner did not, as the record will reflect, at any time during the trial of this cause make an objection based on this Amendment, nor did she file a motion for new trial; nor does the record reflect that she raised this

particular Federal question on her initial appeal to the Court of Criminal Appeals; that is, that there had been a violation of her rights under the Fourteenth Amendment. This question was first raised by Petitioner on Motion for Rehearing. Respondent urges that raising the Federal question for the first time in a petition for rehearing addressed to the highest State court is insufficient unless the Court actually entertains the petition and expressly decides the question. *Herndon v. Georgia*, 295 U.S. 441,443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Forbes v. State Council*, 216 U.S. 396 (1910). As the Court's opinion on First Motion for Rehearing will show, the Court did not attempt to dispose of the Federal question but merely made a distinction between the right to search predicated upon a lawful arrest or a search warrant and one predicated upon the presence of a dead body (which existed in the instant case). The Second Motion for Rehearing was overruled without written opinion. Your Respondent strongly urges before this Honorable Court that due to the reasons herein set out, that as to the second Federal question presented by Petitioner this Court is without jurisdiction to consider and pass upon the same.

TWO POINTS ARE PRESENTED

The Points present are:

(1) Whether the action of the trial court (sustained by the Court of Criminal Appeals) in striking Petitioner's application for a continuance, amounted to a denial to Petitioner of due process of

law and the equal protection of law secured to Petitioner by the Fourteenth Amendment to the Constitution of the United States.

(2) Whether the introduction in evidence of letters, writings, and photographs obtained by officers from Petitioner's home, in her absence and without search warrant, and their use in evidence both to show a culpable state of mind and to rebut her defense of insanity, amounted to a denial to Petitioner of rights secured to her under the Fourteenth Amendment to the Constitution of the United States, where there existed a state statute providing that evidence obtained in violation of the Constitution of the United States cannot be admitted in evidence.

THE STATUTES INVOLVED

The Petitioner asserts that the statutes involved are those as set out in the appendix to her petition on pages 13-16 and again as set out in her brief on pages 3-4.

STATEMENT

The Petitioner, Mary Jean Parsons, was charged by indictment with the murder of her husband, Richard O. Parsons, on or about February 16, 1952, in El Paso County, Texas. The uncontradicted evidence shows that on the early morning of said date, the Petitioner shot and killed her husband as he lay in bed in their apartment in El Paso, Texas (S.F. p. 1166). The Petitioner communicated with her family early in the evening of the same day and told them what she had done, and the family arranged

for the services of El Paso attorneys. The attorneys interviewed the Petitioner in her apartment about 7:30 that evening and viewed the body of the deseased and looked around the apartment. The Petitioner explained to the attorneys what had happened and one of the attorneys then called the El Paso County Sheriff's Department and the Coroner. The attorneys then took Petitioner to the Sheriff's Office, at which time she was placed in jail. These circumstances were later related in her confession made that evening (S.F. 1166). Immediately upon receiving the information, the Coroner proceeded to the apartment of the Petitioner and deceased where he found the body of the deceased lying in bed. The Coroner examined the premises and shortly thereafter police officers arrived and an investigation was conducted under the direction of the Coroner. (S.F. 77-85). In the course of this investigation the Coroner found and pointed out to one of the police officers some torn pieces of paper in an open waste basket in the kitchen of the apartment, which was later pieced together to form what is referred to in the testimony as Petitioner's torn note (S.F. 105). Several letters addressed to the deceased and in Petitioner's handwriting and an album of photographs taken at the wedding of the Petitioner and deceased were also found in the apartment and were taken by the officers as evidence in said cause.

An indictment charging the Petitioner with murder was returned on February 29, 1952. On the 12th day of May, 1952, in El Paso County, Texas, an affidavit was filed to the effect that Petitioner was insane as of that date and was insane as to the date

charged in the indictment and prayed for a preliminary hearing before a jury to determine her mental condition at both times. This hearing commenced on May 12, 1952, and was concluded on May 27, 1952, at which time the jury found Petitioner to be sane at the time alleged in the indictment and sane at the time of the trial. (S.F. 1119-1120.) On May 28, 1952, the cause was transferred on change of venue to the 30th District Court of Wichita County, Texas. On January 26, 1953, after Petitioner had twice successfully quashed venires in said cause, the trial of the case was again called and Petitioner filed her motion for continuance which was not sworn to by her as required by Article 545 of the Texas Code of Criminal Procedure. On this ground, the State filed a motion to strike said application for continuance, which motion was sustained by the Court and the case proceeded to trial on its merits. The Petitioner entered a plea of not guilty to the indictment and the sole defense of Petitioner throughout said trial was again that of insanity at the time of the commission of the offense and insanity at the time of said trial on its merits. In the course of the trial, in order to show Petitioner's culpable state of mind and to rebut Petitioner's defense of insanity, the State offered in evidence various of the writings, letters and photographs found during the Coroner's investigation in the apartment of the Petitioner and deceased. On February 11, 1953, the jury in said cause returned their verdict, and found the Petitioner sane at the time alleged in the indictment and sane at the time of the trial and guilty of murder and assessed her punishment at confinement in the State

penitentiary for a period of ten years. On the following day, February 12, 1953, motion for a new trial was waived and the Petitioner was duly sentenced in accordance with the jury's verdict. Thereafter an appeal was taken to the Court of Criminal Appeals of Texas.

On November 18, 1953, the Court of Criminal Appeals of Texas affirmed in all things the judgment and sentence of the trial court and on February 10, 1954, overruled Petitioner's First Motion for Rehearing. A Second Motion for Rehearing on behalf of the Petitioner was overruled thereafter without written opinion, and on the 11th day of March, 1954, on Petitioner's motion, said Court issued an order staying the mandate in order that Petition for Writ of Certiorari might be filed in the Supreme Court of the United States.

ARGUMENT

The Respondent's contentions as to the absence of jurisdiction of this Honorable Court in this cause have heretofore been presented, and without waiving the same, your Respondent herein now submits argument on the merits of the two questions herein raised by the Petitioner.

I.

The action of the trial court in striking Petitioner's application for a continuance for failure to comply with the provisions of Article 545 of the Texas Code of Criminal Procedure does not amount to a denial to Petitioner of rights secured to her

under the Fourteenth Amendment to the Constitution of the United States, nor do the provisions of Article 708, Texas Code of Criminal Procedure, have any application to this cause and therefore could in no way amount to a denial to Petitioner of a reasonable opportunity to obtain a continuance and to a denial of due process of law and the equal protection of law secured to her by the Fourteenth Amendment to the Constitution of the United States.

The application for continuance was stricken on motion of the State because it was not sworn to by Petitioner but by one of her attorneys. Article 545, Texas Code of Criminal Procedure provides: "... All applications for continuance on the part of the defendant must be sworn to by himself...."

Counsel for Petitioner who swore to said application for continuance contended that he did so because the Defendant was insane and the facts of said motion were known to said Counsel.

As was contended by your Respondent and confirmed by the opinion of the Court of Criminal Appeals of Texas, the presumption that an accused is sane, the fact that a judgment had been entered upon a preliminary trial of that issue that she was not insane and the finding of the jury in the trial on its merits against the plea of insanity, both at the time of the offense charged and at the time of the trial, precludes the assumption that the Petitioner was insane and for that reason did not need to comply with the requirements of Article 545, Texas Code of Criminal Procedure. The Appellate Court held that it would not be warranted in reversing the conviction

because of the striking of the motion for a continuance *unless it would have been error for the trial court to have overruled the same.*

The Appellate Court pointed out that *no showing* was made that the failure to secure a continuance resulted in injury to the Petitioner. In fact, no motion for new trial is to be found in the record and the record fails to reflect by affidavits of the absent witnesses or otherwise that they would have testified as stated in the motion if they had been present at the trial on its merits. (See opinion in Petition for Writ of Certiorari, pp. 26-27.) The record does reflect that the Petitioner was able to produce at the trial on its merits nineteen lay witnesses and five psychiatrists who testified as to the Petitioner's mental condition. Certainly the absence of the two witnesses claimed by Petitioner to have been enciente but who had previously testified at Petitioner's preliminary sanity hearing, wherein she was found to be sane at both times could not have amounted to a denial to Petitioner of rights secured to her under the Fourteenth Amendment, and no attempt at such a showing had previously been undertaken by Petitioner.

The mere assertion by Petitioner's Counsel that she was insane will not exempt her from compliance with Article 545, Texas Code of Criminal Procedure. Petitioner, as every other person under the law, was presumed to be sane; she had been adjudicated sane by a jury on preliminary sanity hearing some eight months prior to the murder trial at which time another jury in another jurisdiction again adjudicated her to be of sound mind, both at the time of the commission of the act and at the time of her two separate trials. So it can be readily seen that the simple as-

sumption of her Counsel that she was insane, in view of the above, cannot serve as a basis for now claiming that to require her to swear to said application herself would amount to a denial of her rights under the Fourteenth Amendment.

Article 708, Texas Code of Criminal Procedure, provides the following:

> ". . . All persons are competent *to testify* in criminal cases except the following:
> "1. Insane persons who are in an insane condition at the time when they are offered as *witnesses*, or who were in that condition when the events happened of which they are called to *testify*. . . ." (Emphasis supplied.)

It can be plainly seen by the very wording of this statute that it has no applicability to the point raised by Petitioner herein. This article relates purely to the competency of persons who testify as witnesses in criminal cases. *Petitioner was never at any time offered as a witness.* Furthermore, under Texas decisions, even if there had been a prior judgment and commitment against the Petitioner for lunacy, that fact of itself would not have disqualified her as a witness. *Saucier v. State*, 156 Tex. Crim. 301 (1950), 235 S.W. 2d 903, *Certiorari denied*, 341 U.S. 949, *Rehearing denied* 342 U.S. 843.

Petitioner's Counsel undoubtedly are confusing the provisions of the Texas Law requiring the verification of an application for continuance with the provisions relative to the competency of one who is offered as an actual witness in a criminal case.

There has therefore been no showing that Petitioner was denied any rights secured to her under the Fourteenth Amendment.

II.

There was no denial of Petitioner's rights secured to her under the Fourteenth Amendment to the Constitution of the United States by the allowance in evidence of letters, writings and photographs obtained during the Coroner's investigation at the apartment of Petitioner and deceased, in her absence and without a search warrant. Article 727a, Texas Code of Criminal Procedure, merely reaffirms the rights, privileges and immunities guaranteed to an accused under the Constitution of the State of Texas and of the Constitution of the United States. Therefore under this point, the sole question is whether the rights of the accused were violated under the Fourteenth Amendment to the Constitution of the United States.

It is evident from the record that Petitioner's attorney, acting for her and as her authorized agent in possession of the premises, called the Sheriff's Department and also called the Coroner (S.F. 1166), after he arrived at the apartment and viewed the body of her deceased husband. It was in response to this call that the Coroner went to the apartment and upon finding the body of the deceased instituted an investigation into his death. It was his duty, as Coroner, to obtain information as to whether death was caused by some criminal act, to obtain evidence to prevent the escape of the guilty, as well as to furnish the foundation for a criminal prosecution in

case the death was shown to be felonious. *Pierson v. Galveston County*, 131 S.W. 2d 27, 13 Am. Jur. 108 (1939). The Coroner and the officers assisting him in conducting an investigation to obtain such information were not bound by the rule governing the action of an officer lawfully present for the purpose of arresting the occupant of the premises, nor were they required to obtain a search warrant in order to enter such premises. It was their duty to conduct the investigation at the scene of the homicide and to *preserve* evidence there found which might show that death was the result of an unlawful and criminal act and to aid in identification of the person responsible therefor. The officers were, therefore, lawfully present and in the discharge of their official duties and such an investigation and the search incidental thereto was not of such a nature as to constitute a denial of the rights secured to Petitioner under the Fourteenth Amendment to the Constitution of the United States. It is apparent, under the decisions, that there is a clear distinction between the right to search predicated upon a lawful arrest or a search warrant, and one predicated upon the presence of a dead body, as in the instant case. On this basis it can easily be seen how the instant case may be distinguished from the case of *Lefkowitz v. U. S.*, 285 U.S. 452 (1932). The Appellate Court, merely by way of observation, referred to the holdings in *Salsburg v. Maryland*, 74 S.Ct. 280 (1950), and *Harris v. United States*, 331 U.S. 145 (1947).

There is no formula for the determination of whether a search and seizure is lawful or unlawful, but each case is to be decided on its own facts and

circumstances. This Honorable Court has heretofore held that an official may, as in the instant case, enter a private home without search warrant where an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate. In this case we have the Magistrate, himself, initially entering the premises in his official capacity as Coroner. The subsequent investigation which was conducted on said premises was not only under the authorization of a magistrate, but was conducted under his supervision. Certainly the matter of taking human life amounts to an immediate major crisis and the magistrate's proceeding at once to said premises and entering and examining the same and taking the letters, which were addressed to the deceased, the photograph album and the torn note which was in plain view, was a proper and reasonable discharge of his duties under the particular facts and circumstances of this case. Considering the extremity of the situation and the urgency for immediate action in the case of a homicide, the Coroner's entry into said premises and subsequent examination thereof and the preserving of evidence found therein, were both necessitated and justified. To deny the Coroner and officers under his supervision the right to conduct this investigation upon Petitioner's and deceased's premises, to which her attorney had invited them, thereby waiving her constitutional rights under the Fourteenth Amendment of the Constituion of the United States, and to make such necessary and reasonable search as the circumstances of a homicide would seem to warrant, would defeat the purpose of law enforcement in homicide investigations.

One of the articles taken by the officers was the torn note (S.F. 1163-65) which was introduced by the State in its case in main to show a culpable state of mind on the part of Petitioner. All of the other articles complained of which include the photograph album and letters addressed to the deceased were solely in rebuttal to Petitioner's witnesses on the issue of her sanity. It has many times been held that documents such as these written by the Defendant when in jail or out are clearly admissible upon the issue of sanity. *Joy v. Joy* (Tex. Civ. App. 1941), 156 S.W. 2d 547, and *Jones v. State*, 156 Tex. Crim. 475 (1951), 243 S.W. 2d 848.

In the instant case, there is no distinction to be made between evidence relating to the cause of death and evidence relating to the Petitioner's sanity. Such a distinction cannot be made because both become issues in the trial growing out of the homicide. *Polk County v. Phillips*, 92 Tex. 630 (1899), 51 S.W. 328.

It is respectfully submitted that said letters, writings and photographs taken from the apartment of the deceased and the Petitioner were not unlawfully taken in violation of her rights secured to her under the provisions of Article 727a of the Texas Code of Criminal Procedure and the Fourteenth Amendment to the Constitution of the United States.

A Fortiori, your Respondent would earnestly urge upon the Court that the questions presented in the Petition for Writ of Certiorari are not substantial because:

1. This Honorable Court has not acquired jurisdiction, as heretofore pointed out.

2. The decision below is clearly correct, and no injury has been shown to Petitioner herein.

3. There is no conflict of decision or statutes which make them repugnant to the Constitution or laws of the United States.

4. There is no important question of Federal Law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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